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THE LAW AND JUSTICE

THERE is often complaint that the decisions of the courts are unjust. Probably such complaints have always existed, and they may be no greater to-day than usual. Often, perhaps usually, defeated suitors feel that they have suffered injustice. There is a public feeling that the rules of law produce much delay in criminal cases, that convictions are set aside by the higher courts for what seem trivial reasons, and that often in consequence the guilty escape. Civil cases do not attract so much public attention, but perhaps there is as great cause of complaint in the repeated trials, rendered necessary when the lower courts err in the rules of law they apply. "The glorious uncertainty" of the law is to-day, as it has probably always been, a common charge against courts. There is much public impatience, when measures which seem desirable cannot be speedily effected through the law. A striking illustration of this was shown in the recent strike of the coal miners. Our papers teemed with suggestions of summary methods of compelling the operators to yield, without reference to their legal rights. These complaints have probably much foundation. Out of them has come a growing public feeling, that speedy justice should be done in each case, though to effect this the rules of law have to be bent or broken. This feeling appears to have reached the courts, and some legislatures. I have heard that a judge of the supreme court of Michigan, now deceased, declared that if he could ascertain the justice of a cause before him, he cared nothing for the law.

In the compulsory arbitration provided by statute in New Zealand, the arbitrators are required to do "justice and equity" and from their decision there is no appeal.

I think every practicing lawyer will agree, that there is an increasing tendency in all our courts, from the lowest to the highest, to decide according to what they think is the equity of each case,

bending or breaking the rules of law, when necessary for this purpose. The causes which lead to this tendency are plain. The judges have and ought to have a deep desire to do what is right between the parties. The rules of law bearing on the subject may be uncertain and conflicting. Many cases are most insufficiently argued by the counsel. The judges are burdened with work. If they do not decide promptly, this is an injustice. Not unnaturally, they come to a conclusion, based on their feelings as to the equities in the case at bar, and then shape their law to these feelings.

This tendency in our courts to seek to do justice, if need be in violation of the rules of law, probably meets with general approval. And certainly the ideal of the law, and the great object of every just judge is to do exact justice in every case. And a judge, who has not a profound sense of justice, who is governed wholly by the rules he can deduce from the statutes and the previous decisions, is liable to great errors. Good common sense and a deep sense of justice are necessary to the proper interpretation of legal rules. But there are many considerations which tend to modify the popular view. To present some of them is my object.

Justice means the giving to every one his due. But in different ages and among different classes in the same age and country, there is much contradiction as to what is due to classes and individuals. Until recently slaves were held, in some civilized countries, to whom very little was thought due. In Europe, there were for ages, different legal rights for different classes. And no doubt, it has seemed to masters of slaves, and to nobles, that their legal rights were perfectly just.

To-day in this country, and other republics, the special quality of justice, which meets popular approval, is equality. We pride ourselves in saying, that before the law, all men, of whatever condition, are equal. This theoretical equality is practically threatened on opposite sides. It may well be questioned whether the Negroes of some of our southern states, or the Chinese in California, have any real equality with whites in legal proceedings. Intense race hatred is far more powerful than any legal theories, Again, there is a growing feeling, not merely that the poor and the unfortunate should be treated as the equals of the rich and powerful, but that they should be favored in all legal proceedings. This feeling is constantly exhibited in the verdicts of juries, and not unfrequently in judicial decisions. Pity for the unfortunate is responsible for many distinctions in the cases.

There is growing up among many laborers, a feeling that the rights of property secured to its owners by all our constitutions, are an injustice, that all property is robbery and should be confiscated by the state. This feeling is as yet little felt by our legislators and judges, but a tendency toward it may perhaps be seen in a disposition to increase the relative burden of inheritance and other taxes, in proportion to the value of the estate taxed.

The words justice and equity have a very vague meaning as applied to most judicial contests. In many, perhaps most cases, they have little real application. Whenever by any stretch they can be thought applicable, both suitors claim their benefit, and the court may find it very hard to decide which has the better right. In many cases, the controlling question is what rule will be for the benefit of the public. And in all cases the benefit of the public should be considered as much or more than the equity of the suitors. The interest of the public is in the establishment of convenient, plain rules by which they may guide their business. This justice to the public should never be forgotten through eagerness to do justice between the suitors. But if we consider only the rights of the latter, it is difficult to find any wide rule of equity which is not based on what is customary. Our notions of moral right are chiefly based on the customs of the society in which we have been educated. Different nations and classes vary in their moral notions, mainly because in some way, they have developed different customs. We find great difficulty in tracing back these various customs to any original principles of morals which will be generally accepted. In general, it may be said, that the ordinary and clearest ideas of both moral and legal right, with most people, are based on the rules in which they have been educated. And if customs have no rational basis, the fact that they have been acted on, that rights have grown up in reliance on their validity, constitutes one of the strongest reasons for basing legal decisions on them. If we look into legal history, we shall find that probably much the strongest motive which has affected the law is the desire to make it so fixed that people can know how to act, In the non-progressive nations like China, this desire has been so strong that legal and moral rules undergo little changes for centuries. And in the progressive nations, we find the same tendency. According to Maine's Ancient Law, the course of history has been this: At first, the judges, who decided contests, decided them summarily, according to their feeling of the equity of each case. Each decision was a separate one, and thought to be

founded on a divine inspiration. This is in accordance with a common tendency of early civilizations, to appeal to divine help, where a question is beyond the power of their rulers to understand and decide satisfactorily. The decision was accepted because thought of divine origin.

It may be well to note that those who would have our judges decide according to their notions of equity, bound by no fixed rules, are returning to the primitive stage of judicial decision, and this though it is impossible to restore the belief which made this custom endurable.

The next stage in the history of Greek and Roman law was that of custom. Customs preserved in the knowledge of a privileged, but not inspired class, became the rules for decision. As these customs were not fully known to the common people, and were preserved by aristocracies, the decisions under them were probably not much more capable of being foreseen, than those of the previous judges. The next step in the evolution of the law was the making of brief codes embodying existing customs. These were written on tablets which were set up where they could be generally seen. The effect here is to preserve the customs of the people, and to make them known to the public. Decisions professedly based on these codes constituted thereafter for a long time the law. No doubt, the law was very much changed and enlarged by such decisions, but the attempt at least was made to keep to the rules fixed in the codes. In course of time came statutes, made by one legislator or many. These were deliberate attempts to adapt the law to the new circumstances in which they were enacted. Then came the gradual further development of the law through commentaries of learned lawyers, always professedly based on the codes and statutes. The development of the law appears to have mainly ceased in Athens during the period of its greatest glory, because questions of fact and law were submitted without appeal to the decisions of immense juries, who were expected to decide, and did decide, not according to any fixed rules, but according to their sense of justice, or pity, or whatever emotion the orators of the day could excite. In Rome, questions of fact and law were separated, and the latter left to the decision of trained lawyers, who were guided not by previous decisions, but by commentaries on the law, made by men of the highest eminence for their legal attainments. The result was, that Roman law reached a degree of excellence, which has made it the admiration of all competent judges, and the basis of a large part of the law

of Europe and America. It has also had a great influence on metaphysics and theology.[1]

The development of English and American law has not been unlike that of the Roman law, but there is one important difference. We find our law in our statutes, and the decisions of our courts, but at Rome, previous decisions were not binding on a judge, save in that case. He looked for guidance to the commentaries of the most eminent lawyers. But in Rome and England alike, the decisions of the judges are required to be based on rules of law found in statutes, or legal opinions, or something fixed, on which the suitors may have been supposed to have acted, and not on the individual notions of the judge as to the justice of the case before him. Still in Rome and in England the law was ever developing, changing to meet changes in business, and to correspond with the enlargement of moral ideas. And in this country the law is changing and must continue to change. The question is how can these changes be effected, so that law and morality shall not be far apart, and yet the former shall be so stable as to constitute a basis for action. The subject is great and difficult, but I venture a few suggestions.

The law consists of rules, each rule applicable not to one case alone, but to every like case. The wisdom of every decision must be tried by its agreement with the proper rule. When the opinion of a court does not state directly or impliedly the rule by which the case is decided, the decision affords no test by which its correctness can be tried, and no help to future inquirers, seeking a knowledge of that branch of the law. The opinion fails therefore in its most important part. Opinions are written and published almost altogether for the light they afford, as to what may be expected in the future. The whole doctrine of the binding character of precedents, perhaps the most important in English and American law, is founded on the theory that every decision is based on a rule which will control future cases. The justice of the decision between the parties though important, is of small consequence, compared with the establishment of a rule, which shall clearly and wisely guide the public in the future. And the parties to a suit have no right to any view of justice, which shall make the law obscure or unjust to the public. In order, that such rules may become the basis of decisions, every court of last resort ought to be required to give written opinions in every case. So only can these opinions be brought to

[1] Maine's Ancient Law. Chap. 9.

the attention of that great body of lawyers whose verdict constitutes almost the only restraint upon that disposition to exercise arbitrary power which belongs to all men and therefore to judges. It may be permitted to justices of the peace or jurymen to say, we decided so and so because that seemed justice, but of courts of last resort we have a right to expect a statement of the rule on which each decision is based, and the statement of the rule with its limits is far more important than the argument by which it is reached. We have in the opinions of our courts of last resort elaborate discussions of preceding decisions for the purpose of explaining the conclusions reached. This is in some cases important, as showing just what change in the law is made, but at the best, it is less important, than a clear statement of the rule which is to be the guide in the future. Such rule should be a broad one covering as many cases as can come under it without public injury, and when exceptions are made, they too should be broad and clear. The tendency of some courts to make fine distinctions, to virtually overrule a preceding decision, without frankly saying so is full of evil.

In order to get a clear statement of a rule of law, the facts which render the rule pertinent must be stated with equal clearness. The courts have no right to bind their successors by rules of law not arising out of the facts before them. Facts depend so much on the credibility of witnesses and on the general course of business, that few rules are applicable to their determination. The reasons for the conclusion reached are seldom of interest, save to the parties. Errors in matter of fact affect only that case. The general feeling of the justice of the case may have here its broadest application both with jury and court. When a court has to determine questions of fact and law, as in chancery cases, the facts should first be determined and clearly stated, and then the rules of law pertinent thereto. There is danger when this is not done, that the equity arising out of the facts, which may properly affect their determination, will influence the statement of the rule of law, and so affect injuriously future decisions. When the facts are decided by a jury and questions of law go up to the higher court, and the facts are stated only so far as they show how the questions of law arose, it would seem that there is no chance for a court to be influenced by the facts. But it is a common belief, with lawyers, that courts are thus influenced, and this belief leads to filling bills of exception with evidence and facts having no bearing on the questions of law, and intended only to impress the court with some equity affecting

the general result. And careless and incompetent judges are very liable to this influence. The only protection is for the court to state clearly the points of law before them, and decide according to their general effect on the public, rather than to their special effect on that case. Courts of error are liable to do great injustice to the parties, if they undertake to decide on the equities of a case, when they have but a part of the facts before them.

When the court finds the rule of law applicable to a case settled so as to be free from doubt, that rule should govern the decision, even though it does not meet the ideas of the judges as to what the law ought to be. And this is true, whether the rule has been established by statute or by judicial decisions. When people have acted on rules of law rightfully thought settled, when they have bought property, or made other contracts, based on such rules, then the highest justice requires, that in all suits relating to such property or contracts, the rules settled should be enforced. Of course there may have been decisions so foolish that no one has rightfully acted on them, and there are other unwise decisions on which no rights can be supposed to have been based. In such cases, the courts may well establish a better rule by overruling thoughtless decisions, but in general, the doctrine of *stare decisis* should be adhered to, for it is the foundation of a large part of the certainty and therefore of the justice of the law. When the settled law is unjust, or inconsistent with public interests, its condition should be left to the legislatures rather than to courts, for the reason, that statutes change the law only as to future transactions, while courts can change the law only by changing it as to past as well as to future matters.

In many, perhaps in most cases, which come to our courts, the law is not settled. New questions are perpetually arising, as new methods of business are devised. Upon old questions there may be such a conflict in the decisions that no rule can be extracted from them. The duty of a court in such a case is to make a rule, and then decide the case according to that rule. In making such rule the judges are of course bound to follow the analogies of the old rule, so as to make as little change as possible. Still in many cases, they must and do make a new rule, however much, according to our notions, they try to disguise the new creation and to maintain that they have found the rule, somewhere in the all-elastic principles of the common law. It is in the making of new rules, that judges have occasion for the exercise of the profoundest sense of justice.

But this justice must not be the individual notion of justice, peculiar to one judge, or a bench of judges. Judges like other men may be full of whims. However learned and able, they may be "cranks" on some one subject. They may have opinions as changeable as the fashions in dress. No lasting or wise law can be built on the opinions of such men. Nor must rules of law be fitted only to the apparent equities of the case in court. Rules must be fitted to the future necessities of business, and stated so clearly, that men can thereafter act on them with safety. The general effect of a rule of law about to be established should be the first consideration. The methods of many kinds of business are perpetually changing, through some great law of commerce or profit, hard to understand. So far as possible rules of law should be adjusted to the necessities of business. In interpreting old and vague constitional provisions, they should not be held to limit the ongoing life of the community save where their meaning is clear. Laws are made for society, to help, not to impede its progress. The justice which the courts should administer is a public justice, the justice of the whole, not that of any part or class. Nor should the justice be that determined by the public under some temporary wave of popular passion. One of the highest duties of courts may be to stand up against popular feeling, and administer justice in direct opposition to its demands. And if courts would gain lasting usefulness and fame, they must base their decisions on such profound considerations, as will commend themselves, not merely to the existing generation, but to future ages also.

It is in law as in literature, art, science or religion, or any other great interest of society. He who would live in human memory must appeal not to the fashion or emotions of his day merely, but to those qualities of human nature which are permanent. The great legal writers of Rome were men of this type. Their works live, and in them lives the Roman law, because founded on principles, which to-day commend themselves to all who are able to understand the subject. Like them have been the great judges of England. Such was John Marshall, such must be the judges of to-day, if their decisions are to remain authority for future generations.

There is great difficulty in the development of American law into a harmonious system. There are so many different legislatures and supreme courts, each supreme in its own state, that divergence and not unity would seem the natural result. Then our state legislatures are largely composed of men who know nothing of law, and whose

chief interest is in politics, in the means of getting office, so that they are subject to the control of any interest, which by its political activity can determine the elections. Unfortunately too, our judicial elections are more and more controlled by political considerations. Under the circumstances, it is hardly to be expected that our state courts will make any lasting contribution to the development of the law. Still if a great judge arises in any state, his opinions will be quoted with approval and followed through the whole country.

Would it not be well if there should arise in our great law schools and elsewhere, a body of legal commentators whose opinions should become as authoritative as the "*Responsa Prudentum*" of the Roman law?

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DETROIT